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MONOPOLIES: THE CAUSE AND THE REMEDY.

I. THE CAUSE.

Profound knowledge of the nature of political causes led Daniel Webster in his Plymouth oration of December 22, 1820, to say of the French law of equal inheritance that "if the government do not change the law, the law in half a century will change the government; and the change will not be in favor of the power of the crown." Six years later government made the effort. "The progressive partitioning of landed estates," Charles X said in his speech to the Legislative Chambers, "essentially contrary to the spirit of a monarchical government, would enfeeble the guaranties which the charter has given to my throne, and to my subjects. Measures will be proposed to you, gentlemen, to establish the consistency which ought to exist between the political law and the civil law, and to preserve the patrimony of families without restricting the liberty of disposing of one's property."

The situation which now exists in this country reverses French conditions of which Mr. Webster spoke. We have a democratic government in which there have recently arisen great inequalities of property. We are perplexed by the presence of corporate possessions, which by their size are able to dominate markets, and to affect government through influences whose strength we cannot measure. National consciousness is exercised by the problem how to restore the old conditions of equality upon which our social philosophy has always rested.

The soundness of that philosophy we do not question. The purpose of democratic government is to secure equal opportunities to each citizen. Not equal opportunities alone of sharing in government—for that is not an end in itself—but equal sharing in govern-

ment that each may have equal opportunities of life, liberty and the pursuit of happiness. Democratic government which does not protect these rights has neglected its essential function.

Upon this subject, Mr. Webster said, in words which seem to deal with present conditions:

"The freest government, if it could exist, would not long be accepted, if the tendency of the laws were to create a rapid accumulation of property in few hands, and to render the great mass of the people dependent and penniless. In such a case, the popular power would be likely to break in upon the rights of property, or else the influence of property to limit and control the exercise of popular power."

No statesman of the present day has expressed the facts and origins of existing conditions as they appear in these two sentences, written ninety years ago. The warning is before us, and if our laws have favored the concentration of wealth the reaction upon our system of government need not surprise us.

The tendency to "a rapid accumulation of property in few hands" is the subject which, with increasing insistency, occupies the chief attention of the American people. Accumulations of property by corporate consolidations such as the world has never before seen are subject to a single control. One corporation by its colonizations may change the vote of great States; its accumulations are used to build cities; it disburses annual receipts of over three hundred and fifty millions of dollars, and eighty thousand stockholders (not to speak of the bondholders) pay it allegiance; it has absorbed all old competition, and its size and economic power deter all new; so powerful is "the underground influence" of such an institution, (the phrase is Mr. Taft's) that national policies are affected by the views of the directorate.

In some kinds of business the avenues of trade are open only to a single concern. The farmer may sell cattle, linseed, beet sugar, cottonseed and tobacco only as the trusts choose to buy, and he may buy his fertilizers, his seeding and harvesting machines and his jute-bagging only as the trusts choose to sell to him. The "cost of living," instead of being an expression of the needs and resources of society adjusting themselves through multitudinous transactions, is fixed by central authorities; they limit the output and control the prices of crackers, hams, sugar, salt, kerosene, chewing gum, matches, glue, soil and sewer pipe, radiators, sewing machines, etc. Competition with them offers little hope of success; conversely, escape from their terms is impossible.

Laws are to be tested not by their purpose but by their results. If equality, which is "the very foot and foundation of democracy," be the purpose of our laws they are obviously a failure, for equality does not result. What we are accustomed to call "competition" is the rivalry of equals: the rivalry of unequals is destruction. Wrestlers compete according to classified weights, but you cannot have heavy weight and feather weight classes in trade. Neither legislatures nor courts are able to compel unequals to compete on equal terms. "Commerce," says Montesquieu, "is a profession of people who are on an equality, for merchants of unbounded credit would monopolize all to themselves. The most miserable among despotic states are those where there is such a monopoly." [1]

The conditions are not new. They have been growing upon our consciousness for more than twenty years. Out of them has grown a persistent demand that the conditions affording equality of opportunity be restored; that the equality be real and practical, not theorized and remote; that "the political law" square with "the civil law"; that government be so administered as to carry out the purpose for which it exists. The agitation has lasted too long, the demand is too steady to be neglected. "Statesmen," says Burke,[2] "instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them." [3]

The monopoly possessed by small concerns through the ownership of patents or local advantages excites no alarm. It is the monopoly of mammoth corporations in the staples and general commodities that creates a national danger. Possessing no advantage over competitors except size, their monopoly is obviously due to that alone: their size in turn is attributable to the hope and effort to secure monopoly; if advantage over competitors were not obtained, consolidations would not be made.

The creation of a trust means the joining together of a large proportion of the effective competitors into a concern of great size; it starts with the capital of all, the influence of all, the facilities of all and the customers of all. Securities in any amount may be produced at will—cash avails also for exceptional cases, with which to buy out dangerous rivals if any remain; the same factors create the inducements for the rivals to sell. If they will not sell, the

[1] Spirit of the Laws, ed. of 1778, vol. 1, p. 64.

[2] Thoughts on the French Revolution.

[3] The prejudice is so general as to require recognition by the courts. To charge a corporation with being a trust is held to be libelous *per se*. Sternberg Mfg. Co. *v.* Miller, etc., Co. (1909) 170 Fed. 298.

trust with its greater capital and credit can maintain a price war until they succumb. Then the trust dominates the markets, and simple precautions suffice to deter new competition; the trust will buy all patents and facilities helpful to its control, it will extend in one direction to control the supply of material, and in the other to eliminate middlemen and reach the consumer. The larger it grows the stronger it becomes. Its size gives it competitive power; industrial strength then adds to itself consequential civil and political powers, and the combination is monopoly in its recognized form.[4]

Now it is clear from all historical examples that rapid concentration of the control of wealth is harmful to any national life and especially to that of a democracy. It is necessary to reiterate, for each generation forgets preceding truisms, that a reasonable diffusion of resources should be the solicitude of government. In Bacon's pungent language:—"Above all things, good policy is to be used, that the treasures and monies in a State be not gathered into few hands, for otherwise, a State may have great stock, and yet starve; and money is like muck, not good except it be spread."[5] This has been from the beginning the object of democratic statesmen, and was the basis of Jefferson's re-writing of the Virginia Constitution. He thought a farming population the best class of citizens because it contains a safe distribution of power. With manufacturing and commercial interests danger lies in unchecked power to organize; that power tends to alter the center of political gravity, and Adam Smith speaks of it as "the mean rapacity, the monopolizing spirit of merchants and manufacturers, who neither are nor ought to be the rulers of mankind." The guaranty against the abuses alike of centralizing absolutism, of industrial monopoly

[4]A railroad is to a large extent a natural monopoly. The great amount and permanent fixity of the capital required prevent any ebb and flow of competition in adjustment to demands. A railroad monopoly is not permanently oppressive; its rates are subject to public regulation. The conduct of railroads cannot be the business of numbers of individuals; there is, therefore, socially no oppression or inequality in their being kept out of it. Rate regulation does not need to be followed up by the legislative regulation of all other conditions in the attempt to esablish general competition or general opportunity through equalization of conditions, for railroad-running can never be general. The permissible size of railroad corporations must therefore depend on special considerations.

[5]Of Seditions and Troubles. "With us it should never be forgotten that it is the partibility, the frequent division and unchecked alienation of property, that are essential to the health and vigor of our institutions." Revisers' Notes to the New York Revised Statutes; Fowler, Real Property Law (2 ed.) 1022.

tending to absorb political power, and of impatient democracy is a wide distribution of the points of resistance.[6]

It follows inevitably that if the government permit the place which it should occupy with its equal regulations to be appropriated by a combination of some of its citizens to the exclusion of the rest—still more if the government license such a combination—a new form of organization results which is not democratic in purpose. "Government may be conceived of as merely the instrument of society. Where men are united in groups there arises from their union the necessity of action on behalf of the group. That part of society which attends to the business of the whole is the government."[7] Any exercise of those powers or interference with them by a combination outside of government must, therefore, be repressed or diverted; otherwise government degenerates or is thwarted. This is equally true of Doukhobors forcing their way across country, of labor unions which obstruct the mails, and of associations of manufacturers powerful enough to "write their own tariff."[8] The power of combination is so closely associated with the power of control that one is tempted to say that government is the characteristic function of combination.

Very small combinations are of infinitesimal and unnoticed power; it is only when the combination is of great size that it begins to show its nature. Then either it has assumed functions of government, or it becomes a branch of government itself. Anything else is a condition of unstable equilibrium: a state of affairs, for example, in which the State keeps the peace, controls the army and navy and guarantees the right of property, while the means of subsistence are controlled by the representatives of monopoly, is but a brief stage in a rapid progression.

Republican government is possible because of the interest of citizens in it as their combination; if they are more immediately interested in another combination of equal power government must yield. It is useless to deny that loyalty, like other virtues,

[6]Compare the constitutions of Arkansas, Nevada, North Carolina, Tennessee and Texas, which group monopolies and perpetuities as institutions which "are contrary to the genius of a free State, and ought not to be allowed," and Mr. Taft's advocacy in his recent Denver speech of state action to "make much more drastic the rule against perpetuities which obtains at common law." In this speech he even advocated legislation similar to the French law of equal inheritance, in order to avoid the concentration of wealth.

[7]Encyc. Brit., tit. Government.

[8]See the remarks of Mr. Justice Swayne in Trist *v.* Child (1874) 21 Wall. 441.

has its causes and without them does not exist. Only the sentimentalist or the demagogue ignores the fact that "man acts from motives relative to his interest, and not on metaphysical speculations."

One definite economic apology is made for monopoly—that it reduces prices and benefits the consumer, that if it be a "good" monopoly the community will be benefited. If this be true, if the huge corporation can produce at lower prices than competitors, the latter will have to go out of business. The reduction of prices put forward as an excuse means, therefore, the destruction of competition.

But the defense urged by monopoly that the advantages of production are transferred to the consumer is not to be accepted. Certainly there is no voluntary benefaction; monopoly will transfer only as much benefit as it is compelled to. The jargon of "good" and "bad" trusts means that the "bad" trust has to fight for its monopoly, has to undersell competitors; the "bad" trust is the one that makes price benefits for the buying community. It is "bad" because it is competing effectively; when the fight is over and the outcries of beaten competitors have subsided it becomes a "good" trust. What the "good" trust does in the matter of prices we do not know. Trusts are organized for pecuniary profit, and their prices are dictated by their power and prudence. Once in charge of all markets they may reduce prices much slower than discoveries of trade, economies of production, benefits of inventions will warrant. After a time we have no means of knowing what prices would have been without monopoly; where it exists all opportunity for economic comparison ceases.

Apologists find it generally prudent to be more vague and to defend the great size of corporations without admitting the existence of monopoly. "If the law," says Mr. Knox, "will guarantee to the small producer protection against piratical methods in competition and keep the highways to the markets open and available to him for the same tolls charged to his powerful competitor he will manage to live and thrive to an astonishing degree."[9] Concern for national well-being is thus harmonized with zeal for trade. Of corporations it is said that "their number and size alone appall no healthy American. We are accustomed to large things and to do them in a large way."[10]

[9]Answer of Attorney-General to Judiciary Committee of Senate, January 3, 1903, Doc. IV. 73rd Senate, 57 Cong. 2nd Sess.

[10]Mr. Knox's speech at Pittsburg.

But if you permit incorporation without fixing any limit to the permitted amount of capital and allow each corporation to choose its own size, a corporation of such a size will be formed as eventually to own all the Bessemer ore in the country. There is no need to discuss the phrase "piratical methods" or to attempt to learn whether it has any tangible meaning, for if you permit great inequalities you destroy the possibility of competition. The advantages of individualism cut no figure if the law gives the right to combine to such an extent as to make competition impossible, and equal freight rates are of minor importance if the trust control the supply or the prices of raw material. To put it broadly, democracy—or the equality of right—is valueless without the power to command enjoyment of the right.

It is not necessary perhaps to explain that the equality now advocated is not the socialist's ideal of the equal division of property. Such a condition is impossible to create, and equal rewards for unequal services are not desirable. It is to the common advantage, as it has always been, that enterprise, talent and industry should be able to secure the rewards which are their due.

Nor is the argument directed to the abolition of corporations. The affairs of modern commerce demand large agencies. Corporations are an essential element of modern civilization, and their existence within reasonable limits should be fostered. Exactly where the limit is to be found need not here be pointed out; it is clear that it has been passed when the corporation has attained monopoly.

The point which it is sought to emphasize is that *monopoly* is neither an element of democratic civilization, nor consistent with it. If the laws *tend* to create a rapid accumulation of property in few hands, the result, as Mr. Webster said and as we see it, must be either that the popular power will break in upon the rights of property or that the influence of property will limit and control the exercise of popular power.

Corporations have been favored because they permit the combination of many feeble individuals into an effective unit; these arguments are now used to justify the combination of combinations, or combination of the powerful, on the ground that thereby great things are accomplished. But they do not appeal to minds rankling under inequality, or appease the sense of social injustice. Mr. Buxton's argument in Parliament on the Executory Devise Bill, or "Thellusson Act," was the flower of Tory logic:

"It was necessary that the bulk of the people should be very poor in order to render them laborious; that the lower ranks should have but little prosperity, in order to excite their industry; and that there should be some extremely rich, to supply the state in cases of imminent exigency, and advance schemes and enterprises which required capital. All these had gone very well as the law stood at present; and he saw an insurmountable objection to limitations in point of time, which would interfere with marriage settlements, with the growth of timber, with provisions for future generations."[11]

Out of such arguments arises the most serious evil due to the size of corporate accumulations—reaction against all wealth, the struggle of the popular power "to break in upon the rights of property." Popular resentment against corporations shows itself in graded taxation, extortionate charges for the privilege of incorporation, exactions in the form of license fees. The moderate corporation suffers for the sins of the immoderate, and legitimate trade, most conveniently conducted in corporate form, is impeded.

The evil does not stop there: schemes are devised—income taxes, inheritance taxes—to reduce inequalities. But taxation does not create equality of opportunity; the exhaustion of capital makes forever impossible a diffusion of it, and unemployment is not relieved by destroying the employers; unquenchable prejudices and forces are set at work, and in the struggle against wealth no one is cool enough to see that the nation is the chief sufferer. Present politics are coming too largely to consist on the one hand of the efforts of the great corporations in many and unappreciated ways to limit and control the exercise of popular power, and on the other hand of the efforts of the mass of the people through popular leaders to break in upon the incidents of property ownership.

Under such pressures we advance towards socialism. For the purpose of regulating the control of property by corporations we permit governmental powers whose development is inconsistent with private ownership by individuals. We cannot frame theories of property which shall be weak in the hands of corporations and a complete defense for the citizen. We cannot institute a government which shall be a despotism toward monopoly and pure democracy toward the individual, nor can we establish a judiciary who shall be open to public opinion in corporate matters and of unyielding independence in all other cases.

[11]Parl. Register, June 20, 1800, (vol. 12, p. 140).

There is then an antagonism between organic structure and changing conditions—between the theorized political system on the one hand and the social and economic forces on the other: the problem has become a matter of importance to every citizen.

It is worth considering that while the dangers which we all see are new, they are new only in form. The exertions of an individual have never been viewed jealously by the law; his ability to collect wealth in a lifetime is negligibly small; the solidarity of a fortune cannot long hold out against the increasing number of descendants and the disintegrating effects of idleness and luxurious youth. Such inequalities as arise out of the differences of human faculty cannot be prevented by government without discouraging force and putting a premium upon weakness. But artificial inequalities have long been recognized as one of the greatest dangers to a democracy. For this reason methods of accumulation threatening excessive inequalities—monopolies arising out of combinations of men, private trusts for accumulation, and perpetuities—have long been forbidden.

Since *Magna Charta* the English stock has resisted any attempt of the crown to enfranchise a monopoly. Elizabeth expressed to the Commons through her Lord Keeper the hope that "her dutiful and loving subjects would not take away her prerogative, which is the choicest flower in her garden, and the principal and head pearl in her crown and diadem; but would rather leave that to her disposition, promising to examine all patents and to abide the touchstone of the law."[12] Against this farming out of the country the nation's demand of liberty prevailed; the grants of monopoly were revoked and the freedom of England recognized with an apology—"Never since I was a queen did I put my pen to any grant but upon pretext and semblance made to me that it was both good and beneficial to the subjects in general, though a private profit to some of my ancient servants who had deserved well. * * * Never a thought was cherished in my heart that tended not to my people's good."[13]

Attempts at monopoly in another form consisted in "mortmain" holdings of land. The prejudice against them is exhibited in the series of "Mortmain Acts" attached to all corporate accumulations which would diminish the personal responsibility of the landed gentry and yeomanry who were the reliance of England.

[12]D'Ewes, Journal, 159.

[13]Parl. Hist. IV., 480.

"My Lords," says a speaker in debate on the Mortmain Bill of 1736, "as the landed interest of this kingdom has always been * * * the great bulwark for defending the liberties of the people, against the attempts of ambitious encroaching power, therefore it has always been reckoned a most necessary and fundamental maxim of our constitution, not to allow any great share of our landed interest to be vested in societies or bodies politic, either sacred or profane; this maxim appears to be coeval with our monarchy, and is expressly established by the great charter.

With regard to our lay corporations we have of late years widely departed from the maxims of our ancestors. * * * This has made it very easy to set up any new corporation to extend their dominions almost as far as they please; so that I think we are in a danger of having the greatest part of our lands swallowed up by some corporation or other, unless a stop be put to it in time; and if ever this should come to be our case, we may then bid adieu to our trade, and to all future improvements."[14]

A like national danger from another quarter lay in perpetuities, and this danger also was removed by the common sense of the English, expressing itself in the common law and in the "Thellusson Act."

We have now repealed the policy of centuries and re-established mortmain. All that is denied to individuals by limitations of nature and of public policy is now granted to corporations by law. Upon their power to possess no limit is placed. Every day the mammoth corporations are withdrawing from the general mass of property in the country an increasing proportion of the common wealth, which thus passes beyond the sphere of general distribution. The citizen, who in theory enjoys an equal opportunity with all others to engage in business and to acquire a share in that general mass of property, finds that the mass is shrinking, and that his equal opportunity is an opportunity without a goal. This is mortmain, and these are its evils.

One of two results must come out of the conditions we are creating. Either the owners of property will administer the nation, parcelling out to their employees their allotted substance and their daily duties; or the nation will administer property—not buying it, for that requires payment—but rather regulating the prices, the hours of labor, the return allowed to capital, if any, etc.[15]

[14]Parl. Hist., Debate in House of Lords, April, 1736.

[15]The latter alternative is selected by administrative officials who are willing to adopt a system of monopoly regulated and therefore guaranteed by the government. The system, it is said, "should recognize the fact that if the government regulates corporate business it should also extend to it as far as possible that proper protection which is the necessary corol-

We are confronted by alternatives from which the nation shrinks, yet notwithstanding our consciousness of the conditions they continue to intensify. We want no vague assurances, no denunciations of bad trusts, or praise of good trusts—we demand an effective remedy, for the problem of trusts does not tend to solve itself.

"Progress depends upon tendencies and forces in a community. But of these tendencies and forces, the organs and representatives must plainly be found among the men and women of the community, and cannot possibly be found anywhere else. Progress is not automatic, in the sense that if we were all to be cast into a deep slumber for the space of a generation, we should awake to find ourselves in a greatly improved social state. The world only grows better, even in the moderate degree in which it does grow better, because people wish that it should, and take the right steps to make it better. Evolution is not a force, but a process; not a cause, but a law. It explains the source, and marks the immovable limitations, of social energy. But social energy itself can never be superseded either by evolution or by anything else."[16]

Social forces make and unmake social moralities; the rules for individual conduct grow out of the effort to adjust ourselves to the conditions under which we live. Without changing the forces at work we cannot alter the conditions, or expect our canons of individual conduct and propriety to control those social forces. They must be removed, or more powerful ones set in motion. What is needed is a correction of the laws under which inequalities arise; without discouraging business vigor or capacity or encouraging envy we wish to reincorporate our privileged classes, with their intelligence, progressiveness and energy, into the bulk of the nation.

The specific questions we have to ask now become simpler. If monopoly is the evil, and if monopoly is due to the size to which our corporations have been allowed to grow, it should not be difficult to find the cure. It remains then briefly to consider the policy of our corporation statutes which have invited this abnormal growth; to outline a reversal of that policy in connection with certain specific checks upon corporate size; to contrast these proposals with the Sherman Act as a scheme for controlling monopoly; and to examine the correspondence of such proposals with our constitutional system.

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lary of such regulation. If the government undertakes to regulate corporate combination it is also obvious that such combination must be recognized within its proper limits." Report of the Secretary of Commerce and Labor of December 13, 1909.

[16]Morley, On Compromise.

II. The Remedy.

We have seen that the existence of monopoly is due to the size of corporations—the extent to which under the sanction of law wealth is allowed to consolidate, in defiance of the principle that "all inequality in a democracy ought to be derived from the nature of the democracy, and even from the principle of equality."[17] One man would accept monopoly if it would not cut prices; a second objects to its raising of prices; a third holds it responsible for extortionate tariffs and a power over government. What the several features add up to is an objection to the monopolistic consolidation of wealth, to "combinations great enough to cause just anxiety on the part of those who love their country more than money."[18]

The size of corporations is due to our general corporation laws. Before their adoption one corporation could not own the stock of another; companies were formed to exercise specified charter powers, and it was paradoxical for one to own the stock of another, which other carried on the business.[19]

But it was helpful to business in the era of "prosperity" that combinations should be facilitated. The easiest method of corporate combination is stock buying, so that was allowed by statute.[20]

[17]Montesquieu, Spirit of the Laws.

[18]Holmes, J., in Northern Securities Case (1904) 190 U. S. 197, 407.

[19]See the remarks of Taft, J., in Marbury *v.* Kentucky Union Land Co. (1894) 62 Fed. 335, 342; People *v.* Chicago Gas Trust Co. (1889) 130 Ill. 268; Buckeye Marble Co. *v.* Harvey (1892) 92 Tenn. 115; Franklin Bank *v.* Commercial Bank (1881) 36 Oh. St. 350; Central R. R. Co. *v.* Collins (1869) 40 Ga. 582.

[20]A comparison between decisions adverse to stock ownership by a corporation and subsequent statutes permitting it shows the pressure of wealth upon the state legislatures:

Alabama—Commercial Fire Insurance Co. *v.* Board of Revenue (1891) 99 Ala. 1 invalidated holding by insurance company in bank stock. Laws of 1903, p. 316*j* allows any corporation to hold stock in another.

California—Knowles *v.* Sandercock (1895) 107 Cal. 629 held that a corporation organized to manufacture furniture cannot hold stock in a hotel company. See also Pauly *v.* Colorado Beach Co. (1893) 56 Fed. 428. Laws of 1903, c. 209, sec. 12, allows one railroad company to hold stock in another railroad if they are not competing lines.

Connecticut—Byrne *v.* Schuyler Electric Mfg. Co. (1895) 65 Conn. 336 held that one manufacturing corporation cannot hold stock in another. The Corporation Act of 1901 permits one corporation "to hold, purchase and convey such real and personal estate, including the stocks and bonds issued by other corporations, as the purposes of the corporation require."

Illinois—People *v.* Chicago Gas Trust Co. (1889) 130 Ill. 268 decided that a gas company organized under the general law, whose articles of association express the purpose to buy and sell the stock of any gas company, has no power to accomplish that purpose as the statutes of Illinois give no such power. Laws of 1891, page 185, authorizes any railroad to own the stock of any railroad connecting in another State.

The growth of trusts there found its beginning. The buying of stock control is a simple matter requiring usually the agreement of only a few persons. It avoids an unnecessary tying up of funds in that part of the value of the properties represented by the minority stock; it avoids publicity; dissenting minorities, who might attempt to prevent actual mergers, are helpless;[21] the subsidiary companies may remain apparently independent for indirect purposes and to avoid antagonizing public opinion.

During the same period restrictions upon the amount of capital which a corporation may control have gradually been removed by the legislatures. It has been made possible to form a company with a capital stock limited only by the imagination of the founders as to the extent of power they can grasp. The mammoth corporations have reached their present size only because the State, their creator, explicitly permits it and opens to them the easiest way.[22]

Maine—Franklin Co. *v.* Lewiston Institute for Savings (1877) 68 Me. 43 held that a savings institution canot invest its funds in stock of a manufacturing corporation. Public laws of 1901, chapter 229, article 14, empowers manufacturing corporations to purchase and hold the stock or bonds of any other corporation.

New Jersey—Central R. R. of N. J. *v.* Pennsylvania R. R. (1879) 31 N. J. Eq. 475 decided that one railroad company could not subscribe for the stock in another railroad. Public Laws of 1893, page 301, provides that any corporation may hold the shares or any bonds, securities or evidences of indebtedness of any other corporation.

New York—Milbank *v.* New York, L. E. & W. R. R. (N. Y. 1882) 64 How. Pr. 20 held that one railroad company had not inherent power to purchase and hold stock in another railroad company. Laws of 1892, chapter 688, section 40, empowers any domestic or foreign corporation (except moneyed corporations) to own the stock, bonds and other evidences of indebtedness of any other domestic or foreign corporation.

Ohio—Railway Company *v.* Iron Company (1888) 46 Ohio St. 44 decided that a corporation organized to manufacture iron products had no power to buy stock in a railroad company although its products were used in the construction and operation of railroads. Laws of 1902, page 390, provides that "a private corporation may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, whether domestic or foreign, *but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition.*"

Pennsylvania—McMillin *v.* The Carson Hill Union Mining Co. (1878) 12 Phila. R. 404 held that one mining corporation cannot hold stock in another. Public laws of 1901, chapter 603, permits any corporation organized for profit to hold the stock and bonds of any other corporation.

[21]The privilege of intercorporate stockholdings, besides endangering the public sense of security, has been made the frequent vehicle for fraud, oppression, and other destruction of minority interests; one railroad has improperly been made to finance another, and the corporate funds which belong equally to stockholders or policyholders have been used as levers to move the speculative markets for ulterior purposes.

[22]The matter of size was the real cause of the Northern Securities Case. A statute forbidding "contracts in restraint of trade" was applied to a

The state anti-monopoly legislation then well illustrates the saying that the men of Miletus are not stupid, but they do the things stupid men do. "The result of such legislation is simply to prevent combination where the appearance of competition is maintained and to sanction it where the combination is open, avowed and most effective."[23] Mr. Hadley ten years ago pointed out that "laws against pools will lead to the formation of trusts, laws against trusts will lead to actual consolidation."

The Sherman Act affords no relief against size. Very few monopolies are due to exercise of control over interstate commerce. Substantially all the trusts are consolidations for manufacture or other form of production, and each trust owns directly, or through stock ownership of constituent companies, the goods which it introduces into interstate commerce. No construction can be put upon the Act which will check monopoly,[24] and it requires no statistical information to prove that the Act has done little in this direction: the trusts are more flourishing now than at any previous time. As Mr. Taft said at Bath in September, 1906:

"It would seem as if Congress itself knew that the exil existed, but had a most indefinite idea of how it was to be described, and the matter was apparently turned over to the courts, as the cases arose and decisions were invoked, to work out the exact character of the offences denounced, and the limitations which were to be introduced into the statute in order that the interpretation of it might accord with what was practical and reasonable."

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combination which did not in fact restrain trade, but excited alarm on account of its power. The statute was stretched to cover the case. The dissenting judges pointed out that as corporate size was not in terms obnoxious to the statute, the same result might be effectively accomplished by a corporation buying properties of mammoth extent.

[23]President Lehmann, before the American Bar Association at Detroit, August 24, 1909.

An illustration is given by Chapter 97 of the Laws of Montana of 1908 prohibiting individuals, partnerships and corporations from forming "what is known as a trust" or limiting production or fixing prices or creating a monopoly, and Chapter 106 of the same laws, which authorizes incorporation for any amount, and permits one corporation to hold the stock of another, with all the rights, powers and privileges of ownership.

[24]It does not seem to the writer that the recent decision at circuit against the Standard Oil Co. can be sustained. A doctrine as to the extent of federal power over commerce proceeding from one exercise of it to a further and more indirect extension as a necessary consequence of the first exercise has no theoretical limit, for in logic each cause is in its turn the effect of an earlier cause. The historical explanation of our institutions is not solely to be found in the expansion of the commerce clause; the limitation on that power of Congress is not non-existent because not expressed; it is found at the point where opposing powers meet it.

He who denounces what he cannot define is trying to reach results, not causes. The consequences of size cannot be defined, as they cannot be traced. As Mr. Justice Holmes said of the beef trust:

"Its size * * * makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space that something of the same impossibility applies to them."[25]

The political moralists tell us to let corporate size alone. The evils of monopoly are to be reached by the "regulation of conduct." As for ways and means to accomplish the desired results the proposals are still nebulous. The Sherman Act, whose vagueness is said to have done so much harm, is to be redrawn or "interpreted" so as to make competition free in the interest of consumers—and at the same time restrain competition in the interest of the *weaker* among competing producers and traders. Consistency and precision are expected to come of themselves.

This plan is acceptable to monopoly, which assures us it will follow righteousness if allowed to continue to monopolize. "We regard the purchase of the Tennessee Coal & Iron properties," says Mr. Gary, "as wise and expect that the United States Steel Corporation will make big money out of it eventually. I am also confident that the transaction was in all respects legal. The question of monopoly is one of conduct and not of percentage of production alone, and the public in the long run will decide such problems."

The conservative position belongs to those who oppose the adoption of this easy solution and object to monopoly itself. Free competition and freedom of conduct go together. Conduct cannot be regulated except through definitions of misconduct, and no definitions of the misconduct of monopoly can be proposed that do not partake of state socialism. When we come to the proposal of executive and bureaucratic regulation of conduct, we have what Mr. Justice White calls "the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect

[25]Swift & Co. *v.* United States (1905) 196 U. S. 375, 395.

to enforce the law—a conclusion repugnant to every principle of liberty and justice."[26]

Pains are expended in trying to define "good" and "bad" trusts, and though the attempt at definition fails, legal decisions are reached and statutory measures are proposed which are based upon the reality of the distinction. As to such measures one may borrow the figure of Hamilton[27] and say that freedom is to capitalistic monopoly "what air is to fire, an aliment without which it instantly expires." But it could not be less folly to abolish liberty, which is essential to political life, and to social growth, because it nourishes monoply, "than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

There has never been a time when people were not more exercised over the conditions oppressing them than over the causes out of which the conditions had their growth. Everyone is hostile to the effects of monopoly; few will make the effort to penetrate to its cause. Our measures of relief must go straight at the cause. To prevent monopoly we must restrain the consolidation of corporate wealth by limiting corporate size; we should altogether forbid intercorporate stockholdings, and should impose carefully chosen limitations upon the amount of capitalization and the holding of corporate assets. The limitation upon capitalization will depend upon the extent of the national market; if no corporation is allowed to grow big enough to fill this market, some competition at least within the nation is restored.

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[26]Northern Securities Case (1904) 193 U. S. 197, 374.

"There are some cases in which the courts * * * have set sail on a sea of doubt, and have assumed the power to say * * * how much restraint of competition is in the public interest, and how much is not." Of such decisions, it was observed that "the manifest danger in the administration of justice according to so shifting, vague and indeterminate a standard would seem to be a strong reason against adopting it." Taft, J., in U. S. *v.* Addyston, etc., Co. (1898) 85 Fed. 271, 283.

In Cooley Const. Lim. (7 ed.) 133, it is said that

"A marked difference exists between the employment of judicial and legislative tribunals. * * * The law is applied by one, and made by the other. To do the first, therefore,—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act." Mr. Justice Story said that were the judicial powers "joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law." Commentaries on the Constitution (5th ed.) sec. 522. The accumulation of these powers in the same hands "may justly be pronounced the very definition of tyranny" (Madison in the Federalist, No. 47).

[27]Federalist, No. 10.

There are no constitutional obstacles to the adoption of these reforms. It is true that neither state nor federal legislation alone is effective, but if the two authorities work together no part of commerce is beyond due control.

"It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the pre-existing authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted."[28]

We must, to begin with, abandon the delusion that the regulation of monopoly can be conducted by Congress alone under the commercial power; that is a power to regulate the commerce, not the persons engaged in it. The right to engage in commerce comes from the States,[29] and the right is part of the liberty derived from the States. As Jefferson put it, "It is not a gift of any municipal law either of England or Virginia, or of Congress, but in common with all our other natural rights is one of the objects for the protection of which society is formed and municipal law established."[30]

The power to forbid, and therefore to permit corporations to

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[28]White, J., in Northern Securities Case (1904) 193 U. S. 197, 399.

[29]Prentice, Federal Power over Carriers 33-37; See Bowman *v.* Ry. Co. (1888) 125 U. S. 465.

Judge Baldwin's objection (22 Harv. L. Rev. 27, 36) "that a corporate franchise carries no inherent authority with it except as against the sovereign from which it came" fails to distinguish between the extra-territorial vindication of a franchise when directly drawn in question, and the right to engage in commerce, a right which has no dependence upon the franchise. A corporation is a fit grantee of the right and enjoys it to the full extent of state authority; and if South Carolina by its dispensary law chooses, *pro hac vice,* to make itself into a liquor corporation, it must be recognized by others as enjoying the right to trade in liquor in interstate commerce to the same extent as if it were a natural person.

[30]Works (Washington ed.) Vol. IV, p. 199; and see William *v.* Fears (1900) 179 U. S. 270, 274.

embark upon that commerce, or consolidating railroads to continue it, rests with the States which are the source of the right.[31]

Whatever power over commerce Congress may have, whether of regulation, or even of taxation if that were conceded, it has not the authority to prohibit any part of it because of the personality of the one engaging in it. This seems to be Mr. Justice White's meaning in delivering the opinion of the court in the *Employer's Liability Cases:*

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it.

"It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."[32]

It is vital to the continuance of constitutional government that the independence of the commercial power and the police power and the delimitation between them should always be recognized and observed.

As to the relation between a corporation and a State in which it operates, it is true that the Fourteenth Amendment does not apply;[33] the word "liberty" is inapplicable, the real question in this

[31]Pearsall *v.* Great Northern R. R. Co. (1896) 161 U. S. 646; Louisville & Nashville R. R. *v.* Kentucky (1896) 161 U. S. 677.

[32](1908) 207 U. S. 463, 502. Mr. Justice Moody makes the meaning of the court clear in dissenting from it, when he says (p. 526):

"I am quite unable to understand the contention made at the bar that the power of Congress is to regulate commerce among the States and not to regulate persons engaged in commerce among the States. Of course the power to regulate commerce does not authorize Congress to control the general conduct of persons engaged therein."

[33]Western Turf Association *v.* Greenberg (1907) 204 U. S. 359.

connection being the extent of charter powers, and their subordination to the sovereignty of the State. But in relation to the United States government the charter power—which is the expression of "liberty" of the corporation—has already been granted, and inasmuch as a corporation in such relations is a person[34] Congress cannot touch the charter power. The Fifth Amendment then has a broader effect in limiting federal power than the Fourteenth Amendment in limiting state power. In other words, so far as the word "persons" is concerned, corporations are included and are within the protection of both classes; they are excluded only so far as the word "liberty" is inapplicable to the relation between a sovereign and its creature, the corporation.

Congress furthermore may not restrain monopolies by the exercise of any police power over corporations. That power was not conceded to Congress, but remains in the several States for the protection of the lives, liberty and property of their citizens and the integrity of their social institutions. The recognition by Congress in the Wilson Act of the power of the State to control or prohibit the liquor traffic in the course of its general concern for the welfare of its own citizens is wholly inconsistent with the view that Congress can itself prohibit such traffic. If Congress has this police power, then the State has it not, and the Wilson Act is void as a delegation of a power which does not belong to the States. The full possession of this power by the States is established by the course of government and by repeated affirmations of the Supreme Court, and the definition of it[35] includes control of corporate monopolies.

"Undoubtedly," says Mr. Justice White, "the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulation as the creator, the State, may lawfully impose upon its creature, the corporation."[36]

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[34]Gulf, etc. *v.* Ellis (1897) 165 U. S. 150; Blake *v.* McClung (1898) 172 U. S. 239.

[35]See Leisy *v.* Hardin (1890) 135 U. S. 100, 158.

[36]Northern Securities Case (1904) 193 U. S. 197, 398.

"The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their

Here then is indicated the first series of measures in the restoration of equality: *Any State, sincerely hostile to monopoly, may forbid any company, foreign or domestic, to do business within its jurisdiction if it own the stock of others, or through ownership of its own stock be servient to a monopoly, or exceed a forbidden size,* and the legislation may legitimately include corporations already doing business in the State.[37] Such a State would cease to create or voluntarily to foster monopoly.[38]

Such measures would not be complete if they were not adopted by all the States; if the laws of some States should still permit the trust to maintain its monopoly of supplies and manufacture, the other States could not prevent delivery of trust-made goods across the State line;[39] nor sales in "original packages;"[40] nor the activities of agents in obtaining orders.[41] In these respects the exercise of state control over corporations must not hamper the power of Congress. The commerce clause precludes, in the language of Hamilton, "distinctions, preferences and exclusions, which would beget discontent," even though in so doing it interferes with "the justifiable acts of sovereignties consulting a distinct interest."

Where control over two elements of one subject is thus divided it seems obvious that governments should unite their action. If Congress has power over interstate commerce, but not over the personality of the one engaged in it, and if the State has the police power over the corporate personality, but may not wield it because it would (in the language of the cases) "amount to" a regulation of interstate commerce—the two governments in common, each exercising its own power, may accomplish any restraint which

possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by State legislative power." U. S. *v.* E. C. Knight Co. (1895) 156 U. S. 1, 11.

[37]Beer Co. *v.* Massachusetts (1877) 97 U. S. 25.

[38]The exceptional classes of corporations, such as religious and charitable corporations, insurance corporations and so forth, which should be allowed to hold the securities of other corporations, and the circumstances under which all corporations should, for self-protection, be allowed temporarily to hold the securities of other corporations, need no comment here. They are outlined in Pearson *v.* Railroad (1883) 62 N. H. 537, 549. The size of a railroad corporation should, as we have earlier seen, depend upon other questions than the establishment of competition.

[39]Hall *v.* De Cuir (1877) 95 U. S. 485; American Express Co. *v.* Iowa (1905) 196 U. S. 133; Foppiano *v.* Speed (1905) 199 U. S. 501.

[40]Brown *v.* Maryland (1827) 12 Wheat. 419.

[41]Robbins *v.* Shelby Taxing District (1887) 120 U. S. 489.

they agree to be desirable; otherwise "the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever. * * * The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge."[42]

The maintenance of monopolies by certain States against the protests of sister States may be prevented by an Act of Congress, regulative of commerce, providing that the anti-monopoly laws of a State shall apply to all goods owned by corporations whenever they arrive at the territorial boundary of the State and demand entry. The state legislation thus approved should forbid the obnoxious corporations to do business within the state boundaries.

If the state legislation appropriately display an exercise of the police power,[43] it may forbid solicitation of orders[44] and sales in "original packages."[45]

The State statutes may also constitutionally include within the prohibition all deliveries of interstate shipments, and even transportation within the state borders. The outlines of the argument for this may be indicated.

The Constitution does not in terms limit the state police power in connection with the commerce clause, nor is power over interstate commerce in terms withdrawn from the States. A power is given to Congress, and the gift of the power carries the implication of its paramountcy—but the gift of the power does not imply the destruction of other remaining powers serving other functions of government.[46] The police power of the State and the

[42] *In re* Rahrer (1891) 140 U. S. 545, 561, 562.

[43] To be an exercise of the police power it must "have a real and substantial relation to purposes within the scope of the police jurisdiction." Brown *v.* Maryland (1827) 12 Wheat. 419. It must not establish regulations of a commercial character. Norfolk & W. Ry. Co. *v.* Sims (1903) 191 U. S. 441, 449; Bowman *v.* Railway Co. (1888) 125 U. S. 455, 487. There must, of course, be no discrimination against goods as goods coming from another State. Brown *v.* Houston (1885) 114 U. S. 622; Walling *v.* Michigan (1886) 116 U. S. 446; Robbins *v.* Shelby Taxing District (1887) 120 U. S. 489; Scott *v.* Donald (1897) 165 U. S. 58; Darnell & Son *v.* Memphis (1908) 208 U. S. 113.

[44] Delamater *v.* South Dakota (1907) 205 U. S. 93; Westheimer *v.* Weisman (1899) 60 Kan. 753; Rose *v.* State (Ga. 1908) 62 S. E. 117.

[45] *In re* Rahrer, *supra;* State *v.* Snyder (1899) 108 Ia. 205; Stevens *v.* Ohio (1899) 93 Fed. 793.

[46] "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical." Mayor etc. of New York *v.* Miln (1837) 11 Pet. 102, 137.

commercial power of Congress create the occasion mentioned by Hamilton "where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority."[47] When the power of one or the other government, Congress or the State, is found to be directly or impliedly restricted (except by the provisions drawn from the Bill of Rights) it is in order that the other may exercise the power without interference. There is no other purpose in the limitation,[48] and the commerce clause was not intended to prevent action by Congress and the separate States in harmony.

It was perfectly understood at the time of the adoption of the Constitution that the power to regulate commerce was granted to Congress to enable it to frustrate the attempts of the States to adopt discriminating rules of interstate commerce hostile to their confederates: but it was not supposed that the grant of the power to prohibit state action was itself a prohibition, for, as Mr. Justice Curtis said,

"If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations."[49]

"But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed." Leisy *v.* Hardin (1890) 135 U. S. 100, 109.

"I admit that in the exercise of their legitimate authority over any particular subject, the States may generally use the same means which are used by Congress, if these means are suitable to this end."

Story, J., in Mayor etc. of New York *v.* Miln (1837) 11 Pet. 102, 156.

[47]Federalist, No. 32.

[48]Congress, for example, notwithstanding the prohibition in the first clause of Article 1, section 9, by Act of Feb. 28, 1803, forbade masters of vessels to land negroes in the ports of any State which "has prohibited, or shall prohibit, the admission or importation of such negro."

[49]Cooley *v.* Board of Wardens (1851) 12 How. 299, 319.

This duality of control was well expressed by Justice Moody in his dissenting opinion in the *Employer's Liability Cases:*

"There is no conflict in powers, though there may be conflict in legislation, referable to different powers. * * * For the power hitherto exercised by the States over this particular subject has never been deemed to be a regulation of commerce, but rather an exercise of their authority to regulate generally the relations of men to each other, which may indirectly affect such commerce."[50]

The case Mr. Justice Moody had before him precisely illustrated the exercise of power under the overlapping jurisdictions, for while the State has commonly regulated the relation of master and servant in the case of employees of interstate railroads,[51] Congress may supersede the state legislation by a federal enactment, the employees while engaged in interstate commerce being as it were instrumentalities of interstate commerce and, therefore, subject to regulation under the commerce clause.

The cogent argument of legislative construction exists in numerous federal statutes near in time to the adoption of the Constitution, wherein Congress instructed the executive to adopt the state pilotage laws,[52] "to pay due regard to the inspection laws" of the respective States with a view to their enforcement,[53] and "to co-operate faithfully in the execution of "the state quarantine and health laws."[54]

Modern legislation is more sweeping, for it is not limited to boundary inspections, but involves the power of Congress to give its approval to state legislation directly affecting interstate trade in commodities. The Wilson Act[55] declares that liquor upon arriving in a State shall become subject to the laws of the State "enacted in the exercise of its police power" to the same extent as though the liquor had been produced in the State, "and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise,"—in other words, that Congress

[50](1896) 207 U. S. 463, 534.

[51]Tullis *v.* L. E. & W. R. R. (1899) 175 U. S. 348, and cases cited.

[52]Act of 1789.

[53]Act of April 2, 1790, 1 Stat. 106; Act of March 2, 1799, ch. 22, sec. 93.

[54]Act of Feb. 25, 1799.

It may be said that these statutes do not aid in constitutional construction, because it is established that the States may perform the several acts and also regulate ferriage without the permission of Congress. Gibbons *v.* Ogden (1824) 9 Wheat. 204; Mayor etc. of New York *v.* Miln (1837) 11 Pet. 102, 139, 141, 147; Barbier *v.* Connolly (1885) 113 U. S. 27, 31. But the statutes have some inferential weight, for if the power were clear without the permission, there would be no reason for giving it.

[55]Act of Aug. 8, 1890, U. S. Rev. Stat., p. 826, sec. 428.

does not intend to exercise a regulative power, nor to imply by silence that the interstate trade is to be free from state regulation under the police power. The Lacey Act[56] adopts precisely the same method to enable the State to protect its game,[57] and the federal Oleomargarine Act[58] applies to that commodity the same principle of distinguishable jurisdictions over the subject and over the commerce. Of all such statutes the Nitro-Glycerine Act[59] is the most significant, for in terms it authorizes a State to regulate *or to prohibit* the transportation of high explosives across the state border. Dynamite is a legitimate article of traffic;[60] yet Congress has declared that its own power over interstate commerce shall not be allowed to prevent the State under the police power from prohibiting the transportation of the commodity across state lines.

In these statutes Congress has adopted the rule, laid down by the State as a police matter, as its own rule for the regulation of commerce, and this is the gist of the decision in *In re Rahrer,* where the Court says:

"The laws of Iowa under consideration in *Bowman* v. *Railway Company,* 125 U. S. 465, and *Leisy* v. *Hardin,* 135 U. S. 100, were enacted in the exercise of the police power of the States, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce."[61]

In declaring that the state rule of prohibition shall affect the sales of liquors in original packages on their arrival in the State—which sales are a part of interstate commerce,—[62]

"Congress has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws.

[56]Act of May 25, 1900, 31 Stat. L. 187.

[57]The Treasury Department has ruled, July 15, 1909, that the Lacey Act permits the State of New York to destroy aigrettes imported from abroad while on the arriving steamship and without sale as undeclared goods, although without it the state game law would be invalid as trenching on the power to regulate commerce and as conflicting with the tariff act.

[58]Act of May 9, 1902, 32 Stat. L. 194.

[59]Act of July 3, 1866, U. S. Rev. St., p. 826, sec. 4280.

[60]And therefore not within the scope of the Lottery Case (1903) 188 U. S. 321.

[61](1891) 140 U. S. 545, 559.

[62]Brown *v.* Maryland (1827) 12 Wheat. 419.

It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. * * *

The differences of opinion which have existed in this tribunal in many leading cases upon this subject, have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the State.

We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent. * * *

This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress."[63]

Precisely the same reasoning seems to have inspired the Chief Justice to say in *Leisy* v. *Hardin:*

"Inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the States so to do,* it thereby indicates its will that such commerce shall be free and untrammelled. * * *

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power *without the assent of Congress.*

To concede to a State the power to exclude, directly or indirectly, articles so situated, *without congressional permission,* is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States."[64]

It has sometimes been said that the Wilson Act did not involve the application of the state police power to interstate commerce, and merely "drew the line" between the two classes of commerce. In practical effect it did, but the power of Congress so to enact was not based upon its incidental power to draw a line. (a) That is not the form of the statute. (b) The power to draw a line cannot

[63] *In re* Rahrer (1891) 140 U. S. 545, 561, 562, 565.

[64] (1890) 135 U. S. 100, 109. That the constitutional rule, as laid down by the Rahrer case, and many times applied, is correctly stated in the text, see the opinion of Mr. Justice Gray in Rhodes *v.* Iowa (1898) 170 U. S. 412, 433, and People *ex rel.* Hill *v.* Hesterberg (1906) 184 N. Y. 126, 132.

be so used as to abandon part of the field[65] over which the Constitution extends the power, if the jurisdiction over the field be sole. That would be a genuine delegation of power. (c) What shall be said of the Dynamite Act of 1866 which permitted any State to cut off interstate transportation altogether? (d) The inquiry in the numerous cases as to the meaning to be attributed to the silence of Congress[66] necessarily means that Congress may or may not as it wishes prohibit state action; if it can only prohibit there is no reason for construing its meaning. The rule of the *Cooley* case is itself an incontrovertible argument that Congress may approve the state measure. If the State has no power whatever over interstate commerce, then its regulation of it by exercise of the police power is unconstitutional, irrespective of anything that Congress may do or by silence imply. But if the State has a power which is subject to the paramount power of Congress, we have a scope for the rule that the action of Congress, or its silence implying prohibition of state action, prevents exercise of the state power. The power of Congress is paramount; it is only its exercise—whether express or implied is immaterial—that is exclusive.[67]

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[65]Brown *v.* Maryland (1827) 12 Wheat. 419; Leisy *v.* Hardin (1890) 135 U. S. 100.

[66]Cooley *v.* Board of Wardens (1851) 12 How. 299; see Bowman *v.* Ry. Co. (1888) 125 U. S., 465. 482.

[67]It is not infrequently said by the court *arguendo* that the power is exclusive; but there is in such statements no intention to dispute Hamilton's distinction, and when the distinction is in mind the court is careful to preserve it. Thus in Brown *v.* Houston (1885) 114 U. S. 622, 630, the power of Congress is said to be "certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse between the States, *as Congress has left it.*" In Bowman *v.* Chicago etc. Ry. Co., *supra,* at p. 493, it is said that the State "cannot *without the consent of Congress,* express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be." "A State statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another State to pay license fees for permission to do so, is, *in the absence of Congressional action,* a regulation of commerce in violation of the Constitution." Stoutenburg *v.* Hennick (1889) 129 U. S. 141, 148. In the License Cases (1847) 5 How. 504, 579, Taney, C. J., said to the same effect "that the mere grant of power cannot upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."

Restraints upon the consolidation of wealth have been suggested, and the constitutional method of their application has been outlined. The measures must remedy, not punish or discriminate, and the arrogance of majorities should not be set against the "arrogance of wealth." We want no socialistic limitations upon individual wealth, no confiscation of inheritances. Method and plan should show the conservatism which treats the institution of property as necessary to progressive civilization and real equality.

We must recognize that such measures will require determination and effort for their fulfilment; one difficulty with our attempts at reform is that we think abuses can be easily removed. "In the course of a long administration, the descent to vice is insensible; but there is no re-ascending to virtue without making the most generous efforts." Better than centralizing political power will be to decentralize corporations; the supreme solicitude of government should be the formation of character, and the end will not be achieved by a system of monopolies creating a dependent population, combined with a centralized administration whose constant tendency is to make us forget that we must exert ourselves. Against such tendencies of decline a constructive statesmanship should be opposed, for, as the most profound of modern political thinkers has put it,

"there is only too much of this fatuousness, this readiness to believe that for once in our favour the stream shall flow up hill, that we may live in miasmatic air unpoisoned, that a government may depress the energy, the self-reliance, the public spirit of its citizens, and yet be able to count on these qualities whenever the government itself may have broken down, and left the country to make the best of such resources as are left after so severe and prolonged a drain. This is the sense in which morality is the nature of things."[68]

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Though the authority of the License Cases has been overthrown, it is only upon the point of the construction to be given to the silence of Congress. Taney's reasoning above is not disputed, and the question is always as to the repugnancy of state and congressional regulation; an instance of harmony raises no question of power.

[68]Morley, On Compromise.